No. 17762

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK PALERMO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from
The United States District Court
Southern District of California

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT FRANK PALERMO

MORRIS LAVINE
215 West 7th Street
Los Angeles 14, California

JACOB KOSSMAN
1325 Spruce Street
Philadelphia 7, Pennsylvania

Attorneys for Appellant
FRANK PALERMO

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

Page

RULES

No. 17762

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK PALERMO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from
The United States District Court
Southern District of California

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT FRANK PALERMO

Appellant Frank Palermo asks leave of Court to supplement the previous brief filed with the following supplemental brief adding five points on appeal in his behalf.

This is a supplemental brief to the opening brief filed in this case on behalf of Frank Palermo. A statement of the facts other than those referred to in this argument is contained in the original brief.

Appellant was charged in an indictment with violations of sections 1951, 875(b) and 371 of Title 18, U.S. Codes. The trial started on February 21, 1961 and immediately upon the outset of the trial the appellant, who had been at liberty on an original bail of $100,000, reduced to $2500, and on $2500 bail at all times thereafter until the first day of the trial, February 21, 1961, was thereupon summarily committed to jail and denied the right to have bail during the time of trial. Sentence was pronounced on December 2, 1961 and the trial court again fixed bail pending appeal for the appellant, who was released on December 4, 1961 in the bail of $100,000 and has been at all times since then at liberty on bail.

Judgment of imprisonment of 15 years on Count 1 and a fine of $10,000 and 5 years each, consecutively, on Counts 2, 4 and 5; 5 years each, consecutively, on Counts 6, 8 and 10 were pronounced with the sentences of imprisonment imposed on Counts 2, 4, 5, 6, 8 and 10 to run concurrently with the sentences imposed on Count 1 (R. 1496).

JURISDICTION

Notice of appeal was filed on December 2, 1961,

the same date as sentence was pronounced, together with an application for bail, which was granted (R. 1520). Jurisdiction is conferred upon this Court by reason of the provisions of Title 18, section 3291, Rule 19, Federal Rules of Criminal Procedure and Title 28, sections 1291 and 1294(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS SUPPLEMENTAL BRIEF

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be ... deprived of life, liberty or property without due process of law."

The Sixth Amendment to the Constitution of the United States provides as follows:

> "Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

> informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Eighth Amendment to the Constitution of the United States provides as follows:

> "Bail. Punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Tenth Amendment to the Constitution of the United States provides as follows:

> "Rights reserved to the States or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 18, U.S. Codes, section 371, provides as follows:

"Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, U.S. Codes, section 875(b), provides as follows:

"(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate

commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

Title 18, U.S. Codes, section 1951, provides as follows:

"Interference with commerce by threats or violence.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section --

"(1) The term 'robbery' means

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia, and any point outside thereof; all

commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45."

Title 18, U.S. Codes, section 3141, provides as follows:

"Bail may be taken by any court, judge, or magistrate authorized to arrest and commit offenders, but in capital cases bail may be taken only by a court of the United States having original or appellate jurisdiction in criminal cases or by a justice or judge thereof."

Title 18, U.S. Codes, section 3142, provides as follows:

"Any party charged with a criminal

offense and admitted to bail, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy, and brought before any judge or other officer having power to commit for such offense; and at the request of such surety, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such surety; and the person so committed shall be held in custody until discharged by due course of law."

Title 18, U.S. Codes, section 3143, provides as follows:

"Additional bail.

"When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously admitted to bail on any such charge is about to abscond, and that his

bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof."

Rule 46(a), Rules of Criminal Procedure for the District Courts of the United States provides as follows:

"Right to bail.

"(1) Before Conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

SPECIFICATION OF ERRORS IN ADDITION TO OPENING BRIEF

I

The appellant was denied due process of law and the equal protection of the laws in being committed to jail at the opening of the trial of the action without notice or opportunity to be heard and with great prejudice to him in the preparation of his defense and in his appearance before the jury.

Bail is a matter of right under the Eighth Amendment to the Constitution of the United States and under Rule 46(a), Rules of Criminal Procedure for the District Courts of the United States. Stack v. Boyle, 342 US 1, 96 L.ed. 3.

II

Section 1951 of Title 18, inherently and as construed and applied in this case, violates the Fifth Amendment to the Constitution of the United States. Congress has not intended to include boxing and prize fighting within the meaning of section 1951, Title 18. Boxing is a local affair and Congress has not legislated in this section to cover boxing or prize fighting. The statute, inherently and as construed and applied in this

case, insofar as boxing and prize fighting are concerned, is so vague, indefinite and uncertain as to constitute a violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

III

Section 1951 of Title 18, inherently and as construed and applied in this case, violates the Tenth Amendment to the Constitution of the United States.

IV

Section 875 of Title 18, inherently and as construed and applied in this case, violates the Fifth and Tenth Amendments to the Constitution of the United States.

V

Section 371 of Title 18, inherently and as construed and applied in this case, violates the Fifth and Tenth Amendments to the Constitution of the United States and duplicates the charge contained in Title 18, section 1951, which is exclusive.

ARGUMENT

I

THE APPELLANT WAS DENIED DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS IN BEING COMMITTED TO JAIL AT THE OPENING OF THE TRIAL OF THE ACTION WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD AND WITH GREAT PREJUDICE TO HIM IN THE PREPARATION OF HIS DEFENSE AND IN HIS APPEARANCE BEFORE THE JURY.

BAIL IS A MATTER OF RIGHT UNDER THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND UNDER RULE 46(a), RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES. STACK v. BOYLE, 342 US 1, 96 L.ED. 3.

At the very opening of the trial, on February 21, 1961, the trial judge, without notice, peremptorily ordered the appellant to be committed to jail pending trial. His bail had been reduced and he had been at liberty prior to trial on $2500 bail. The trial covered a period of months.

Rule 46(a) provides as follows:

> "Right to bail.
>
> "(1) Before Conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise

of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

Section 3141 of Title 18 provides:

"Bail may be taken by any court, judge or magistrate authorized to arrest and commit offenders, but in capital cases bail may be taken only by a court of the United States having original or appellate jurisdiction in criminal cases or by a justice or judge thereof."

Section 3142 of Title 18 provides:

"Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy, and brought before any judge or other officer having power to commit for such offense; and at the request of such surety, the judge or other officer shall recomit the party so arrested to the custody of the marshal, and indorse on the

recognizance, or certified copy thereof, the discharge and exoneratur of such surety; and the person so committed shall be held in custody until discharged by due course of law."

Section 3143 of Title 18 provides:

"Additional bail.

"When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof."

There is no provision in either the statute

or rules for committing a person in the federal court into custody pending trial. To do so is to commit a presumptively innocent person into custody:

(a) Thus to prejudice him in the eyes of the jury, who are bound to learn, as in this case, from publicity and otherwise, that the defendant is in custody;

(b) Prejudice him in the preparation of his defense because he is not free to meet with his attorneys and to assist them at all and any time in the preparation of his defense while locked up.

(c) To deny him, a presumptively innocent person, the right to his liberty.

The office of bail in a criminal case is to secure the due attendance of the party accused to answer the indictment and submit to a trial and the judgment of the court thereon.

United States v. Foster, (1948, DCNY), 79 F.Supp. 422 (dealing with a motion for an order permitting defendants, enlarged on bail, to travel beyond the court's jurisdiction, without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be

given effect)

United States v. Parker, (1950, DCNC), 91 F.Supp. 996, affd (CA4th), 184 F.2d 483 (dictum)

United States ex rel. Rubinstein v. Mulcahy, (1946, CA2d NY), 155 F.2d 1002

The traditional right to bail before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction.

Stack v. Boyle, (1951), 342 US 1, 96 L.ed. 3, 72 S.Ct. 1

Spector v. United States, (1952, CA9th Cal.), 193 F.2d 1002

Unless this right is preserved the presumption of innocence would lose its meaning.

Stack v. Boyle, (1951), 342 US 1, 96 L.ed. 3, 72 S.Ct. 1

Spector v. United States, (1952, CA9th Cal.), 193 F.2d 1002

The view has been taken that under the Eighth Amendment to the Federal Constitution, which prohibits excessive bail, there is a qualified constitutional right to bail before trial.

United States v. Fiala, (1951, DC Or.),
102 F.Supp. 899

Right to bail under Rule 46(a)(1).

Rule 46(a)(1), dealing with the right to bail before conviction, provides as follows:

> "A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

Under Rule 46(a)(1) an accused who has not yet been brought to trial has an absolute right to be admitted to bail in a non-capital case.

Stack v. Boyle, 342 US 1, 96 L.ed. 3

Supreme Court:

Stack v. Boyle, (1951), 342 US 1, 96 L.ed. 3, 72 S.Ct. 1

Fourth Circuit:

United States v. Parker, (1950, DCNC),

91 F.Supp. 996, affd (CA4th), 184 F.2d 483 (dictum)

Seventh Circuit:

Heikkinen v. United States, (1953, CA7th Wis.), 203 F.2d 738

United States v. Weiss, (1956, CA7th Ill.), 233 F.2d 463

Ninth Circuit:

Spector v. United States, (1952, CA9th Cal.), 193 F.2d 1002

The rule demands that the defendant be given the opportunity to request admission to bail before a magistrate promptly after his arrest.

Marte v. Government of Guam, (1953, DC Guam), 115 F.Supp. 524

As a prerequisite to granting bail, the court may require the accused's personal presence within the territorial boundaries of its authority.

Meltzer v. United States, (1951, CA9th Cal.), 188 F.2d 913 (also stating that there seems to be no constitutional requirement that any bail be fixed until the accused is within the jurisdiction of the court of indictment)

The right to release before trial is

conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.

Stack v. Boyle, (1951), 342 US 1, 96 L.ed. 3, 72 S.Ct. 1

Spector v. United States, (1952, CA9th Cal.), 193 F.2d 1002

A person placed upon bail is free to go and do what he wishes, to meet his attorney at any hour of the day or night and to assist his attorney in getting the evidence together, in locating witnesses and in every step in the preparation of the trial. This right he has if not committed to custody pending trial. He is a presumptively innocent person and should not be denied this right. Only in capital cases has there been an exception and even in these cases a person may be released on bail.

As stated in Rule 46(a)(1), bail in capital cases is a matter of judicial discretion.

See: Ex parte Monti, (1948, DCNY),

79 F.Supp. 651, infra, Sec. 4

The denial, therefore, of bail pending trial was a denial of the right to prepare for trial, a denial and seriously affected the fairness of the preparation and carrying on of the trial and was a denial of due process of law and equal protection of the laws guaranteed by the Fifth Amendment to the Constitution of the United States.

The right to have an attorney of one's choice, well prepared, is a right guaranteed by due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

Powell v. Alabama, 287 US 45, 77 L.ed. 158

In Powell v. Alabama the court said, quoting the words of Webster, so often quoted, that by "the law of the land" in intended "a law which hears before it condemns" had been repeated in varying forms of expression in a multitude of decisions.

In Holden v. Hardy, 169 US 366, 389, 42 L.ed. 780, 790, the necessity of due notice and opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard" and Mr. Justice Field,

in an earlier case, Galpin v. Page, 18 Wall 350, 368, 369, 21 L.ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has his day in court was "as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard ... What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right".

The judge in Ex Parte Chin Loy You, 223 F. 833, pointed out that the right to be represented by counsel was recognized as an essential to any fair trial of a case against a prisoner.

Due preparation for trial, especially in a case of the magnitude which the instant case presented, requires the defendants to have free movement under bail. As set out in Stack v. Boyle, 342 US 1, 4-5, from the passage of the Judiciary Act in 1789 to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered

preparation of a defense and serves to prevent the infliction of punishment prior to conviction.

Stack v. Boyle, 342 US 4, 5, 96 L.ed. 3

Then the arbitrary revocation of bail at the outset of this trial deprived this appellant of "this traditional right to freedom before conviction" which would have permitted him the "unhampered preparation of a defense" (Stack v. Boyle, 342 US 4, 96 L.ed. 6) and would have also removed the necessary prejudice which his confinement brought about and its effect on the jury. The revocation of bail at the outset of a trial and before conviction is nowhere provided for in the federal rules nor by any act of Congress and if it did so, it would offend the Eighth Amendment to the Constitution of the United States. It results in the arbitrary and capricious confinement of a defendant who is presumptively innocent for the presumption of innocence clothes a defendant before and throughout the trial of the case and until or unless a jury convicts him.

The trial judge arbitrarily ignored this presumption, ignored the psychological and improper effect which this procedure had upon this appellant and the other appellants, who were likewise jailed,

and deprived him of that traditional freedom necessary to prepare his full defense, to confer freely with counsel of his choice at the place or places where his counsel wanted to meet him and see him and without the necessity of conferring during the limited hours provided for in confinement and while one is in custody and without the privacy one is entitled to have if he is on bail and confers with his own attorney. This procedure and proceeding, therefore, deprived the appellant of rights guaranteed by the Constition of the United States, deprived him of the right properly to prepare for and present his trial and therefore denied him due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

II

SECTION 1951 OF TITLE 18, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. CONGRESS HAS NOT INTENDED TO INCLUDE BOXING AND PRIZE FIGHTING WITHIN THE MEANING OF SECTION 1951, TITLE 18. BOXING IS A LOCAL AFFAIR AND CONGRESS HAS NOT LEGISLATED IN THIS SECTION TO COVER BOXING OR PRIZE FIGHTING. THE STATUTE, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, INSOFAR AS BOXING AND PRIZE FIGHTING ARE CONCERNED, IS SO VAGUE, INDEFINITE AND UNCERTAIN AS TO CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Section 1951 of Title 18 was aimed at labor

racketeering. All of the reported cases under the Hobbs Act (Title 18, section 1951) involve labor union racketeering, at least up to 4 L.ed.2d, page 1846.

Congress had no intention to include boxing within the scope of the federal laws any more than baseball.

A boxing match "is of course a local affair".

United States v. International Boxing Club of New York, 348 US 236, 99 L.ed. 290

It is like the showing of a motion picture.

United States v. Crescent Amusement Co., 323 US 173, 183, 89 L.ed. 160, 168

Or the performance of a vaudeville act.

Hart v. B.F. Keith Vaudeville Exch., 262 US 271, 67 L.ed. 977

Or the performance of a legitimate stage attraction.

United States v. Shubert, 348 US 222, 99 L.ed. 279

Congress had no more intention of including this type of sport or enacting it into a federal crime than it did baseball.

Toolson v. New York Yankees, Inc., 346 US

346, 98 L.ed. 64

United States v. Shubert, 348 US 222, 99 L.ed. 279

Boxing is merely entertainment in a different guise and as Justice Frankfurter points out in his opinion in United States v. International Boxing Club, 348 US at page 248, and as Justice Minton points out at page 251, it can be adequately dealt with by local authorities.

As stated by Justice Minton in his dissenting opinion in United States v. International Boxing Club, 348 US at 251, "In the Baseball Case, this Court held that traveling from State to State to play the game and all the details of arrangements were incident to the exhibition. In Toolson v. New York Yankees, Inc., 346 US 356, 98 L.ed. 64, 74 S.Ct. 78, we did not overrule the Federal Baseball decision; in fact, we reaffirmed the holding of that case ... As I see it, boxing is not trade or commerce. There can be no monopoly or restraint of nonexistent commerce or trade. Whether Congress can control baseball and boxing I need not speculate. What I am saying is that Congress has not attempted to do so."

We likewise state that Congress did not attempt

to aim at boxing in connection with its anti-racketeering statute and that boxing is not intended to become a part of the anti-racketeering statute governed by section 1951 of Title 18, U.S. Codes. We therefore ask this Court to so construe section 1951 of Title 18.

Title 18, section 1951, known as the Hobbs Act, only aims at interference with interstate commerce. As stated in Stirone v. United States, 361 US 212, 4 L.ed. 2d 252, "The charge that interstate commerce is affected is critical since the federal government's jurisdiction of this crime rests only on that interference." Nowhere in the Hobbs Act is prize fighting or boxing defined as commerce nor is there anywhere in the Act any discussion which indicates that Congress intended boxing and prize fighting to be within the purport of the Act. In the discussion of the Stirone case, 4 L.ed.2d at 1846, it was stated, "The reported cases decided under the Hobbs Act all involve representatives or officials of labor unions." There follows a series of citations of cases involving labor unions or their officials. If Congress had intended boxing or prize fighting to come within the broad terms of the Act, it was not tongue-tied

nor pen-tied to define it.

Statute Indefinite in Respect to Boxing

Section 1951 does not include boxing as commerce.

A criminal statute which is so vague, indefinite and uncertain as to fail to set up a clear standard of guilt violates the Fifth Amendment to the Constitution of the United States.

Winters v. New York, 333 US 507, 509, 510, 92 L.ed. 840, 846, 847

M. Kraus & Bros. v. United States, 327 US 614, 90 L.ed. 894

United States v. Sullivan, 332 US 689, 92 L.ed. 297

Musser v. Utah, 333 US 95, 92 L.ed. 562

Connally v. General Construction Co., 269 US 385, 70 L.ed. 322

Lanzetta v. New Jersey, 306 US 451, 83 L.ed. 888

Williams v. United States, 341 US 97, 95 L.ed. 774

United States v. L. Cohen Grocery Co., 255 US 71, 65 L.ed. 516

In Musser v. Utah, a conviction on a charge of conspiring to commit acts injurious to public

morals was set aside for lack of definiteness.

In the context of criminal prosecution we must apply the rule of strict construction when interpreting a regulation or statute.

United States v. Halseth, 342 US 277, 280, 96 L.ed. 308

III

SECTION 1951 OF TITLE 18, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, VIOLATES THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This section reads as follows:

"1951. Interference with commerce by threats or violence.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than

twenty years, or both.

"(b) As used in this section --

"(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all

commerce between any point in a State, Territory, Possession, or the District of Columbia, and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-183 of Title 45."

During the oral argument in the recent case of Toles v. United States, counsel for appellant pointed out to this court the growing expansion of the offenses that are actually State offenses into the field of the federal courts with the result that federal courts have been degraded into superior courts and police courts. The Tenth Amendment did not contemplate that the police powers of the federal government should expand into this area. Section 1951 apparently was aimed at labor unions and labor union racketeering.

Boxing and prize fighting are not commerce

within the meaning of the commerce clause of section 1951 of Title 18 and the statute therefore does not apply to the offenses charged herein and for which the appellant was convicted.

The Tenth Amendment forbids the federal government from invading the States with local offenses. The police powers of the federal government were only meant to protect interstate commerce as such and not local boxing or other local exhibitions.

Nick v. United States, 122 F.2d 660

IV

SECTION 875 OF TITLE 18, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, VIOLATES THE FIFTH AND TENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Again we urge that boxing and prize fighting is not commerce within the meaning of interstate communications and that section 875 of Title 18, inherently and as construed and applied in this case, is not within the scope of federal statutes or federal regulations in that Congress did not intend it to be.

Tenth Amendment to the Constitution of the United States

Nick v. United States, 122 F.2d 660

Toolson v. New York Yankees, Inc., 346 US 356, 98 L.ed. 64

United States v. Shubert, 348 US 222, 99 L.ed. 279

Stirone v. United States, 361 US 212, 4 L.ed.2d 252

Likewise, section 875 of Title 18 does not include any definition of any communications relating to boxing or prize fighting as commerce and is not within the definition of commerce.

V

SECTION 371 OF TITLE 18, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, VIOLATES THE FIFTH AND TENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND DUPLICATES THE CHARGE CONTAINED IN TITLE 18, SECTION 1951, WHICH IS EXCLUSIVE.

Section 371 of Title 18 (62 Stat. 701) is a conspiracy statute. Title 18, section 1951 (62 Stat. 793) provides for punishment for anybody who conspires or attempts to commit the offenses set forth therein. Therefore, the defendants were charged with two conspiracies. In selecting the charge on which the prosecution intended to proceed under Title 18, section 1951, we respectfully urge upon the Court that the prosecution was put to an

election as to whether, if the statute is constitutional inherently and as construed and applied, to elect whether to proceed to charge the completed offense or a conspiracy, since Congress has included both elements in a specific statute of Title 18, U.S. Codes, section 1951. Under the facts of this case, if any crime occurred and was within the jurisdiction of the federal court, the alleged conspiracy necessarily merged with the completed offense and in such a case both could not be charged and tried without subjecting the defendant to double jeopardy on it.

"There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 US 354, 355, 356, 70 L.ed. 986, 987, 988, 46 S.Ct. 513; Gebardi v. United States, 287 US 112, 121, 122, 77 L.ed. 206, 210, 211, 53 S.Ct. 35, 84 ALR 370."

Pinkerton v. United States, 328 US 640, 90 L.ed. 1489

In People v. Stephens, 79 Cal. at 432, the court said "The law does not permit a single individual act to be divided, so as to make out of it two distinct indictable offenses. (Drake v. State, 60 Ala. 43.) Although when a man has done a criminal act, the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once. Here the essential ingredient of the offense was the publication of an article containing several alleged libels. There was but one criminal offense, and that cannot be split up and prosecuted in parts without violating the rule of law, 'That a man shall not be twice vexed for one and the same cause'."

Fifth Amendment to the Constitution of the United States

Green v. United States, 355 US 184, 189, 2 L.ed.2d 199, 205

WHEREFORE, appellant prays for reversal of the judgments on each of the counts of the indictment and for an order directing the dismissal of the causes for want of jurisdiction of the United States courts.

The appellant adopts each and all of the other points of other counsel insofar as they are applicable to him and are in furtherance of a reversal of the judgments as to him.

Respectfully submitted,

MORRIS LAVINE

JACOB KOSSMAN

Attorneys for Appellant
FRANK PALERMO